No. 13010

IN THE

United States

Court of Appeals

for the Ninth Circuit

POTLATCH OIL AND REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN and ROY E. LARSON, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,

Appellee.

Upon Appeal From the District Court of the United States for the District of Montana

PETITION FOR REHEARING

E. J. McCABE,
E. J. McCABE, Jr.
Great Falls, Montana
Attorneys for Appellants

Filed ....., 1952

....., Clerk

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To: The Honorable United States Court of Appeals for the Ninth Circuit:

Come now the appellants in the above entitled cause, by and through the undersigned, their attorneys, and respectfully petition the Court to vacate its decision and judgment in the above entitled case dated and filed October 30, 1952, and to grant ap-

pellants a rehearing in said cause upon the following grounds and for the following reasons:

I

This Court, in holding that the statute of limitations barred any relief to the appellants, erroneously concluded that the statute of limitations commenced to operate in 1923, 1925 and 1936 respectively, to forever defeat the right of appellants to obtain an accounting for all the improper charges made by appellee under the operating agreement (Court's opinion pp. 5, 6) on the theory that refusal of the appellee to correct the charges objected to by appellants constituted a complete repudiation of the trust, assuming the appellee was a trustee. In brief that the statute of limitations has a prospective operation that defeats a recovery for all improper charges and breaches of trust of a similar character by the trustee in the future as well as the past, and thereby effects a modification of a written agreement notwithstanding the trustee continues to act and was bound by the terms of such agreement.

The statute of limitations does not constitute a performance of the obligations of the trustee but merely prevents recovery for past breaches occurred, assuming for argumnet only that the statute commenced to run when the appellee refused the claims of appellants in 1923, 1925 and 1936.

The applicable Montana rule is that the statute is not a performance of the obligation but merely a bar to the remedy if asserted.

Berkin v Healy,
52 Mont. 398, 158 P. 1020

Hicks v. Stillwater County
84M. 38, 274 Pac. 296

Betor v. Chevalier
121 Mont. 337, 193 Pac. (2) 374.

The court apparently and inadvertently overlooked the fact the appellee still continued to be a trustee of moneys improperly retained from appellants from March 18, 1939 to and including January 30, 1943, and which were not barred by the statute, since the appellee during that period continued to act under and receive the benefits of the contract and the complaint was filed March 18, 1947, within the eight-year statutory period.

II

The Court (opinion pages 13, 14) erroneously concluded that the action was barred by laches under the assumption that the action was barred by the statute of limitations and thereby inadvertently overlooked that for the years from March 18, 1939 to January 31, 1943, the statute had not run against the appellants for such years and consequently the rights of appellants were not barred by either limitations or laches for conduct by appellee during such years.

III

The Court indavertently and erroneously concluded that the meaning of the provision of the operating agreement that Ohio **"will pay all expenses and costs**

of developing and operating said lands for oil and gas purposes as herein provided, and shall charge the said party of the first part Forty-five (45%) percent thereof" (emphasis supplied) was the primary question raised by the complaint. (Opinion pp. 12), the Court apparently overlooking the following provisions in the same operating agreement," **The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expense of developing and operating said lands and leases"** (Tr. p. 20) **and "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands"** (emphasis supplied). The opinion wholly fails to mention the last two provisions thereby failing to observe the statutory rule in Montana,

> "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable each clause helping to interpret the other."
>
> Sec. 13-707 R.C.M. 1947.

As a result the court failed to interpret the contract made but in effect interpreted a different one.

IV

The Court (opinion pp. 7-12) held that the witness Jones was incompetent to testify concerning the statement of McFadyen the general manager and agent of The Ohio Oil Company, in charge of the operating of said Company on the ground the death

of McFadyen disqualified Jones under section 93-701-3 R.C.M. 1947.

Apparently the Court wholly overlooked the purpose of such testimony of Jones and the rule of Wilcox v. Schissler, 55 Mont. 246, 175 Pac. 889. The purpose of Jones testimony was to show a circumstance reflecting upon whether the delay of the appellants commencing suit was excusable. It in no way established the contract or any obligation under the contract between appellants and Ohio Oil Company. This matter was discussed at length at pages 71 to 76 of appellants original brief and the evidence was, we believe, clearly admissible for that purpose. The case of Schissler vs. Wilcox above noted, construed the "dead man" statute and held it applied "only who seek to charge a principal by means of transactions or declarations of one known to be an agent of the principal."

The cases cited in support of the Court's decision at page 11 of the opinion were all cases wherein a contract was sought to be established by evidence of declarations of a deceased person.

Phelps v. Central etc. Insurance Co.,
105 Mont. 195, 203, 71 P. 2d 887,

Langston v. Currie
95 Mont. 57, 71, 26 P. 2d 160,

Cox v. Williamson
124 Mont. 512, 520, 227 P. 2d 614.

In the present case the contract was both admitted by the pleadings and established by independent

evidence and the rule of the above cases do not apply.

V

We respectfully invite attention to that part of the opinion (pp. 5, 6) wherein the Court in effect concluded the appellees refusal to pay the appellants their claims in 1923, 1924 and 1936 constituted a repudiation of the trust. The present action seeking accounting was also for monies improperly held during the eight year statutory prior to March 18, 1947, date of filing the complaint (Tr. pp. 11 to 16, 25). Appellees duty as a joint adventurer, trustee and fiduciary to truly account and pay over monies improperly withheld remained notwithstanding appellants be deemed by the Court to have been barred by laches and limitations as to money withheld prior to the last mentioned statutory period. As long as the Appellee continued to act under the operating agreement it was a joint adventurer, trustee and fiduciary, and the obligation to pay appellants the money due them for the period that was not barred by the statute.

VI

The rule of practical construction by acquiescence of the parties relied upon as establishing the meaning of the written contract to be as found by the lower court is wholly without application. The rule of acquiescence applies where by reason of silence for a long period one is presumed to have consented to the act.

30 C. J. S. par. 117 page 539,

Blacks Law dictionery, deluxe edition p. 32. "Acquiescence."

Repeated express objections, written and oral, to the appellee's acts under the agreement and its purported interpretation rebuts conclusively any inference of acquiescence or consent to such conduct.

VII

The Court in concluding that the testimony of appellants witnessJones inadmissible apparently overlooked the fact that the appellee had waived any objection under the "dead man" statute by taking and introducing in evidence on appellee's behalf the deposition of A. M. Gee who testified concerning the transactions between Jones and deceased parties to the transaction and what information was given as to the terms of the agreement by the parties including Sellery and Hurley, now deceased (Tr. 553-560) and for the further reason the appellee pleaded correspondence relative to the transaction between the representatives of appellants and Mr. Firmin, deceased (Tr. 53, 65-89) and for the further reason the appellee stipulated for admission of written communications between the appellants Wilson and appellee's Hurley (deceased) (Tr. 306-317), and by also pleading in the answer communications between appellants' representative Freemen and appellee's Firmin deceased, relative to the transaction (Tr. 65-89).

In Ellis vs. Wadleigh, 182 p. 2d 49, pars. 4, 5, page 55 the Court held that both by failing to make proper

objection and by cross-examination of the witness, Jones Deposition (Tr. pp. 469-475, 478-491, 491-494) discloses examination at length relative to the transaction by the appellee thereby waiving the objection under the "dead man" statute.

Re Gerlach 72A 2d 271, 16 A.L.R. 2d 1397.

As appears from the case of Wright vs. Wilson, 154 F. 2d 616, 620, cited at page 9 of the Court's opinion the rule excluding testimony, of the character of Jones, is condemned "by all of the modern writers on the law of evidence" and Courts favorably incline to facts upon which they may predicate waiver of the statutory rule, such as cross examination, or testimony received on behalf of the protected party and other acts.

58 Am. Jur. pars 356-361, pp. 209-214.

As is stated substantially, in the excerpts in the footnotes to Wright vs. Wilson, 154F. 2d, 620 the rule has outlived its usefulness and the reason for its existence no longer exists.

When the reason for the rule ceases to exist so should the rule.

49 R.C.M. 1947.

Respectfully submitted.

E. J. McCABE,
E. J. McCABE, Jr.
Attorneys for Appellants

CERTIFICATE

We, E. J. McCabe and E. J. McCabe, Jr., attorneys duly and regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit do hereby certify that in our judgment the foregoing Petition for Rehearing in case No. 13010, wherein Potlatch Oil and Refining Company, a corporation, and others, are appellants and The Ohio Oil Company, a corporation, is appellee is well founded and that it is not interposed for delay.

Dated this 28th day of November, 1952.

E. J. McCabe

E. J. McCabe, Jr.

Attorneys for Appellants.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
County of Cascade) ss.

E. J. McCabe, being duly sworn, deposes and says:

That he is one of the attorneys of record for the appellants named in the foregoing Petition for rehearing and resides and maintains his office at Great Falls, Montana,

That Mr. Louis P. Donovan, residing at Shelby, Montana, and Mr. W. H. Everett, residing at Casper, Wyoming, are attorneys for the appellee named in said petition.

That on the 28th day of November, 1952, affiant enclosed true copies of the foregoing Petition for Rehearing in two separate securely sealed envelopes addressed respectively to Mr. Louis P. Donovan at Shelby, Montana, and to Mr. W. H. Everett, at Casper, Wyoming, and deposited said envelopes in the United States Post Office at Great Falls, Montana, with postage thereon fully prepaid.

E. J. McCabe

Subscribed and sworn to before me this 28th day of November, 1952.

Anna Mikesch

(Seal)

Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires

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